IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1517

FEDERATED DEPARTMENT STORES, INC., and SAKS & COMPANY,

Petitioners,

v.

MARILYN MOITIE and FLOYD R. BROWN, individually, and on behalf of others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. The Court of Appeals' Decision is in Conflict with the Decisions of this Court 9

II. The Court of Appeals' Decision is in Conflict with the Decisions of the Courts of Appeals in Other Circuits 17

CONCLUSION 22

APPENDIX A

Original Decision of the Court of Appeals—November 15, 1979 ..... 1a

APPENDIX B

Order and Substituted Decision of the Court of Appeals—January 15, 1980 ..... 6a

APPENDIX C

Decision of the District Court—July 8, 1977 ..... 12a

APPENDIX D

Comparison of Complaint Allegations 18a

TABLE OF AUTHORITIES

Page

CASES:

Ackermann v. *United States*, 340 U.S. 193 (1950) 8, 12, 13 n.14, 17

Angel v. *Bullington*, 330 U.S. 183, 189-90 (1947) 16 n.18

Annat v. *Beard*, 277 F.2d 554, 558 (5th Cir.), *cert. denied*, 364 U.S. 908 (1960) 14 n.15, 15, 18, 20, 21

Appelton Toy & Furniture v. *Lehman Co.*, 165 F.2d 801, 802 (7th Cir. 1948) 18

Barzin v. *Selective Serv. Sys. Local Bd. No. 14*, 446 F.2d 1382, 1383 (3d Cir. 1971) 18

Berryhill v. *United States*, 199 F.2d 217 (6th Cir. 1952) 18, 19

Butler v. *Eaton*, 141 U.S. 240 11

Chicot County Drainage Dist. v. *Baxter State Bank*, 308 U.S. 371 (1940) 9, 17

Clouatre v. *Houston Fire & Gas Co.*, 229 F.2d 596, 597-98 (5th Cir. 1956) 18

Collins v. *City of Wichita*, 254 F.2d 837 (10th Cir. 1958) 18

de Filippis v. *United States*, 567 F.2d 341 (7th Cir. 1977) 18

In re Estate of McDill, 14 Cal. 3d 831, 840, 537 P.2d 874, 879 (1975) 14 n.16, 15 n.17

Ford Motor Credit Co. v. *Uresti*, 581 S.W. 2d 298, 300 (Tex. Civ. App. 1979) 14 n.16, 15 n.17

Kvenild v. *Taylor*, 594 P.2d 972, 978 (Wyo. 1979) ..14 n.16, 15 n.17

Larson v. *Staff*, 340 F.2d 180, 191 n.28 (3d Cir. 1964) 14 n.15, 21

Lubben v. *Selective Serv. Sys. Local Bd., No. 27*, 453 F.2d 645, 650-51 (1st Cir. 1972) 18, 19

Reed v. *Allen*, 286 U.S. 191 (1932) 7, 8, 9, 10, 11, 13, 14, 16, 17

Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) ..5, 10, 21, 22

Page

Reiter v. *Sonotone Corp.*, 579 F.2d 1077 (8th Cir. 1978) 5

Ripperger v. *A.C. Allyn & Co.*, 113 F.2d 332, 334 (2d Cir.), *cert. denied*, 331, U.S. 695 (1940) 18

Stewart Securities Corp. v. *Guaranty Trust Corp.*, 597 F.2d 240, 241-42 (10th Cir. 1979) 18

Sunal v. *Large*, 332 U.S. 174, 181-82 (1947) 17

United States v. *Oppenheimer*, 242 U.S. 85 (1916) 9, 17

Weinberg v. *Federated Dept. Stores, Inc.*, 426 F.Supp. 880 (N.D. Cal. 1977) 4 n.6

Whitehead v. *American Security & Trust Co.*, 285 F.2d 282, 286 (D.C. Cir. 1960) 14 n.15, 21

Wilson's Executor v. *Deen*, 121 U.S. 525, 534 (1887) .. 16

RULES:

Fed. R. Civ. P. 42(a) 6

Fed. R. Civ. P. 60(b) 12 n.13

N.D. Cal. R. 205-2(b) 4 n.5

FEDERAL STATUTES:

15 U.S.C. § 1 2

15 U.S.C. § 15 4

28 U.S.C. § 1254(1) 2

OTHER AUTHORITIES:

In re Uranium Antitrust Litigation, BNA Antitrust and Trade Regulation Report No. 953 at F-1, F-5 n.41 (7th Cir. 1980) 19, 21

BNA Antitrust and Trade Regulation Report No. 941 at A-4 (Nov. 29, 1979) 6 n.9

CCH, Trade Regulation Reports Newsletter No. 414 at 4 (December 3, 1979) 6 n.9

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MARILYN MOITIE and FLOYD R. BROWN, individually, and on behalf of others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in these consolidated appeals on November 15, 1979.

OPINIONS BELOW

The original opinion of the court of appeals (App. A) is unreported. The substituted opinion of the court of appeals (App. B) is unofficially reported in 1980-1 Trade Cas. ¶ 63,144. The opinion of the district court (App. C) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1979. A timely petition for rehearing was denied on January 2, 1980. On January 15, 1980, the court of appeals entered an order withdrawing its prior memorandum disposition (App. A) and substituting a revised opinion (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Following the dismissal in district court of seven separately filed, unconsolidated actions against defendants, the plaintiffs in two of the actions followed a deliberate, calculated strategy not to appeal from the judgments against them but instead to refile essentially the same complaints in another forum.

The question presented is whether those nonappealing plaintiffs can evade the *res judicata* effects of the dismissal of their first complaints merely because the plaintiffs in the other five actions did appeal and obtained a reversal of their own dismissals based on a subsequent decision of this Court in an unrelated case.

STATEMENT OF THE CASE

The two actions involved here, both filed by the same attorney, are among seven purported class actions for treble damages and attorney's fees which promptly followed and substantially copied complaints filed by the federal government in the United States District Court for the Northern District of California in April 1976, charging that petitioners had violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by fixing the retail prices of women's clothing sold by them in

Northern California during a period prior to April 1974.[1] Each of the private actions was filed on behalf of a proposed class of retail purchasers of women's clothing from petitioners' stores.

From the outset, respondents' counsel followed a calculated strategy of attempting to separate his two cases from the five other purported class actions ("the *Weinberg* cases").[2] Unlike the previously filed actions, the first *Moitie* complaint ("*Moitie I*") was filed in a state court—the California Superior Court for Santa Clara County—from which it was removed by petitioners.[3] The first *Brown* complaint ("*Brown I*") was filed in the federal court for the Northern District of California but, unlike the government complaints and the other purported class action complaints based thereon, *Brown I* alleged a conspiracy to fix prices in Southern, not Northern, California.[4]

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[1] *United States* v. *Federated Dept. Stores, Inc., et al.*, CR-76-236-SAW; *United States* v. *Federated Dept. Stores, Inc., et al.*, C-76-858-RHS, both filed April 28, 1976. The criminal action terminated with the entry of nolo contendere pleas by both petitioners. The government civil action was concluded by the entry of a consent judgment against Federated and the dismissal of Saks.

[2] The other five actions are *Weinberg* v. *Federated Dept. Stores, Inc., et al.*, C-76-867-SW and *Eisenberg, et al.* v. *Federated Dept. Stores, Inc., et al.*, C-76-869-SW (both filed on April 29, 1976); and *Musser* v. *Federated Dept. Stores, Inc., et al.*, C-76-1363-SW (removed from the Superior Court of San Francisco); *Morgan* v. *Federated Dept. Stores, Inc., et al.*, C-76-1429-SW; and *Kimmel, et al.* v. *Sommerfield, et al.*, C-76-1671-SW (filed between June 11 and August 9, 1976).

[3] *Moitie* v. *Federated Dept. Stores, Inc., et al.*, C-76-1110-SW (filed May 6, 1976; removed to federal court June 1, 1976).

[4] *Brown* v. *Federated Dept. Stores, Inc., et al.*, C-76-1210-SW (filed June 15, 1976).

The seven actions were assigned to a single judge under the local related-case rule;[5] however, the actions were not consolidated. In January 1977, the district court dismissed each of the seven complaints for failure to state a claim upon which relief could be granted. The principal ground for dismissal was the court's view that retail purchasers were not persons injured in their "business or property" and were therefore not entitled to sue for treble damages under Section 4 of the Clayton Act, 15 U.S.C. §15.[6]

Following dismissal of the complaints, respondents' counsel again took a different tack from the other litigants. While the plaintiffs in the *Weinberg* cases all appealed from the judgments entered against them, no appeal was taken from the judgments dismissing *Moitie I* and *Brown I*. Instead, after the time to appeal had expired, the Moitie and Brown complaints were refiled in the Municipal Court for the Palo Alto-Mountain View Judicial District (*Moitie II* and *Brown II*). In all material respects, including the class action allegations, *Moitie II* and *Brown II* were *verbatim* copies of *Moitie I* and *Brown I*.[7] The asserted primary difference between complaints I and complaints

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[5] Rule 205-2(b) of the United States District Court for the Northern District of California defines related cases as those which

> "(i) Involve the same parties and are based on the same or similar claims; or
>
> "(ii) Involve the same property, transaction or event; or
>
> "(iii) Involve substantially the same facts and the same questions of law."

[6] The opinion of the district court is reported at 426 F. Supp. 880 (N.D. Cal. 1977).

[7] The allegations in *Moitie II* and *Brown II* which are *verbatim* copies of parallel allegations in *Moitie I* and *Brown I* are outlined in Appendix D, *infra*.

II was that the latter purported to state four legal theories of recovery which had not been expressed in precisely the same terms in *Moitie I* and *Brown I:* "fraud and deceit," "unfair business practices," "civil conspiracy," and "restitution of moneys had and received." All these theories were predicated on the same basic allegations copied from *Moitie I* and *Brown I,* namely, that petitioners conspired to fix the prices of women's clothing and thereby caused respondents and the respective classes they purport to represent to overpay for the clothing they purchased from petitioners during the period of the conspiracy.

Petitioners removed *Moitie II* and *Brown II* to the district court and moved to dismiss on the ground of *res judicata.* The district court granted the motion in June 1977, noting that *Moitie II* and *Brown II* "involve the same parties, the same alleged offenses and the same time periods" as *Moitie I* and *Brown I.* (App. C, *infra* at 17a). The court held that, under the doctrine of *res judicata,* the unappealed dismissal of *Moitie I* and *Brown I* barred respondents' attempt to circumvent the district court's prior judgment by relitigating their claim in the guise of *Moitie II* and *Brown II.* This time, respondents appealed.

Pending the appeals in *Moitie II* and *Brown II,* this Court decided *Reiter* v. *Sonotone Corp.,* 442 U.S. 330 (1979). In that case, this Court reversed the decision of the Eighth Circuit, 579 F.2d 1077 (1978), and held that retail purchasers may be injured in their "business or property" within the meaning of Clayton Act, Section 4. On this basis, the court of appeals reversed the dismissal of the *Weinberg* cases and remanded them to the district court.[8] Following remand,

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[8] *Weinberg* v. *Federated Dept. Stores, Inc., et al.,* No. 77-1547 (9th Cir.), order dated June 25, 1979.

the *Weinberg* cases were consolidated in the district court pursuant to Fed. R. Civ. P. 42(a), and pretrial litigation has been proceeding actively.

On November 15, 1979, the court of appeals issued a memorandum decision, labeled "Do Not Publish," reversing the dismissal of *Moitie II* and *Brown II*.[9] Noting that "[t]his appeal presents a complex and novel issue related to the doctrine of *res judicata*," the court acknowledged that "a strict application of the doctrine of *res judicata* would preclude our review of the instant decision." (App. A, *infra* at 1a, 4a.) Nevertheless the court concluded that "[b]ecause the instant dismissal rested on a case that has been effectively overruled, justice requires that the dismissal be reversed." (App. A, *infra* at 5a.)[10]

On November 29, 1979, petitioners filed a Petition for Rehearing noting that the parties had not been asked to brief or argue the "novel and complex" *res judicata* issue on which the court based its reversal.[11]

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[9] Although designated as not for publication, the court's decision was reported in summary fashion in CCH, Trade Regulation Reports Newsletter No. 414 at 4 (December 3, 1979), and the BNA Antitrust and Trade Regulation Report No. 941 at A-4 (Nov. 29, 1979).

[10] The court affirmed the district court's denial of respondents' motion to remand their cases to the municipal court. This aspect of the court's decision is not involved in this petition.

[11] We respectfully note that, contrary to the statement in footnote 2 to the court of appeals' opinion, the parties did brief the general issue of *res judicata*. *See* Brief of Appellees, pp. 2, 11-12, 27-39. However, we are aware of no invitation to brief the specific issues on which the court of appeals based its decision. Moreover, in light of the well established *res judicata* decisions of this Court and other precedents discussed herein, the parties could not have anticipated that the court of appeals would be interested in the question of the impact of the reversal of the appealed cases upon the unappealed *Moitie* and *Brown* cases.

More importantly, the petition noted that the court of appeals' ruling was in conflict with the controlling decisions of this Court and other courts of appeals. On January 2, 1980, the court denied the petition for hearing.

On January 15, 1980, the court of appeals withdrew its prior memorandum disposition and substituted an opinion, which reached the same result. In the substituted opinion, the court of appeals reiterated the statements quoted above regarding the *res judicata* issue. (App. B, *infra* at 9a, 11a.) In addition, relying on three state court decisions, the court held that "non-appealing parties may benefit from a reversal when their position is closely interwoven with that of appealing parties." (App. B, *infra* at 10a.) The court held that—even though the plaintiffs in *Moitie I* and *Brown I* had deliberately chosen not to appeal and sought to circumvent the district court's judgment by filing duplicative actions in another forum—it "could have reversed" *Moitie I* and *Brown I* at the same time as it reversed the *Weinberg* cases. (App. B, *infra* at 10a.) On this basis, the court of appeals sought to distinguish this Court's decision in *Reed* v. *Allen,* 286 U.S. 191 (1932), which held that a party who fails to appeal from an adverse judgment cannot escape the *res judicata* effects of that judgment even if a closely related judgment—in *Reed,* a judgment involving the same parties and the issue of title to the same property—is subsequently reversed on appeal. The court stated that "[t]he other [Supreme Court and court of appeals] cases cited by . . . [petitioners] are similarly distinguishable." (App. B, *infra* at 10a.)

REASONS FOR GRANTING THE WRIT

The court of appeals has decided an important question regarding the application of the doctrine of *res judicata* in a manner which is contrary to the controlling decisions of this Court and squarely in conflict with the decisions of the other federal courts of appeals. This Court has held, in cases closely analogous to the case at bar, that a party who makes a deliberate decision not to appeal from an adverse judgment is bound by that judgment under the doctrine of *res judicata,* even if a closely related or consolidated judgment is subsequently reversed on appeal. *See Reed* v. *Allen,* 286 U.S. 191 (1932); *Ackermann* v. *United States,* 340 U.S. 193 (1950). Prior to the decision below, this application of *res judicata* had been consistently followed in the courts of appeals.

By deviating from the controlling precedents in this area, the court below has undermined the fundamental policy of *res judicata* that there be finality of judgments and an end to litigation. If allowed to stand, the decision will encourage individual litigants suffering adverse judgments in multi-party proceedings—such as the numerous duplicative actions which typically follow in the wake of government antitrust or securities complaints—to engage in burdensome tactical maneuvers, such as the calculated forum shopping pursued by respondents here. The decision below enhances the incentives for trifling with the courts' judgments. Under that decision, individual litigants in multi-party or other loosely related cases will be free to disregard adverse judgments and follow alternate strategies in other courts, as respondents did here, comfortable in the knowledge that, if only one among them follows the orderly course of appealing, the others would still

benefit from any reversal, notwithstanding their own calculated avoidance of the appellate process. As this Court held in *Reed* v. *Allen, supra,* 286 U.S. at 199:

> "[T]he mischief which would follow the establishment of a precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship."

This Court should grant certiorari to make clear the continuing authority of its prior decisions, to eliminate the conflict of decisions among the courts of appeals, and to remove the incentive for further exacerbating the burdens of complex multi-party cases created by the erroneous ruling of the court below.

I. The Court of Appeals' Decision Is in Conflict With the Decisions of This Court

It has long been established that a final judgment from which no appeal is taken is *res judicata,* and that such a judgment does not lose its *res judicata* effects, even if the legal principle upon which the judgment rests is subsequently overruled in another case. *See, e.g., Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U.S. 371 (1940); *United States* v. *Oppenheimer,* 242 U.S. 85 (1916).[12] Thus, if *Moitie* and

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[12] *Chicot County:* The decision in Case No. 1 was based on a statute subsequently held unconstitutional by this Court in another case. In Case No. 2, this Court held that the subsequent invalidation of the underlying statute did not deprive Case No. 1 of its *res judicata* effects.

Oppenheimer: Case No. 1 was dismissed on the basis of a one-year statute of limitations, and was not appealed. Subsequently, this Court held that the one-year limitations period was not applicable to the offense in question. In Case No. 2, this Court held that the prior dismissal was *res judicata* even though based on a legal theory subsequently held to be erroneous.

Brown had been the only private actions brought against petitioners or if the *Weinberg* cases had also not been appealed, this Court's 1979 ruling in *Reiter* v. *Sonotone Corp., supra,* as to the scope of Clayton Act, Section 4, would not have defeated the normal operation of *res judicata* to the unappealed 1977 dismissals of *Moitie I* and *Brown I*. There is no basis for allowing respondents to evade the established principles of *res judicata* and to resurrect their dismissed unappealed actions merely because five other actions were filed by other parties who, unlike respondents, followed the orderly procedure of seeking direct appellate review of the dismissal of their complaints. Indeed, scrupulous adherence to *res judicata* is even more important, not less so, for the maintenance of judicial effectiveness and economy in multi-party actions.

The doctrine that an adverse judgment not appealed is *res judicata,* regardless of its inconsistency with appellate decisions in other—even intimately related—cases, formed the basis for this Court's decision in *Reed* v. *Allen, supra.* That case involved a series of proceedings concerning disputed rights to certain real estate, the determination of which depended upon the construction of a particular will:

Case No. 1—In the first action, *A* and *B* were required to interplead their claims for the rents collected on the disputed property. The trial court ruled that *B* was the proper owner under the will, and *A* appealed.

Case No. 2—While the appeal was pending, *B* brought an action in ejectment against *A* to obtain a declaration of title to the property. Relying solely on the judgment in the first action, the trial court granted

B the relief sought. *A* could have appealed, but chose not to do so.

Reversal of Case No. 1—Subsequently, the appellate court reversed the decision in the first action, which *A* had appealed, and held that *A*, not *B*, was the proper owner of the disputed property under the will and therefore entitled to the rents.

Case No. 3—Following this appellate decision construing the will in his favor, *A* brought a suit against *B* for ejectment, claiming that title to the property should be his. This Court, reversing the court of appeals, held that *A*'s action was barred, on grounds of *res judicata*, by virtue of the adverse decision in Case No. 2, which *A* had failed to appeal. Even though the judgment in Case No. 2 was based entirely on the judgment in Case No. 1, which was later reversed, the Court held that *A*'s failure to appeal rendered the judgment in Case No. 2 a bar to his obtaining relief in the third suit. The Court stated (286 U.S. at 198):

> "The judgment in the ejectment action [Case No. 2] was final and not open to assault collaterally, but subject to impeachment only through some form of direct attack. . . . [I]t is hardly necessary to say that jurisdiction to review one judgment gives an appellate court no power to reverse or modify another and independent judgment. If respondent, in addition to appealing from the decree [Case No. 1], had appealed from the judgment [Case No. 2], the appellate court, having both cases before it, might have afforded a remedy *Butler* v. *Eaton*, 141 U.S. 240. But this course respondent neglected to follow."

A conscious decision not to appeal was also the determinative factor in this Court's decision in *Acker-*

mann v. *United States*, 340 U.S. 193 (1950). In that case, three related individuals had been ordered deported on the ground that they had procured their naturalization by fraud. Their cases had been consolidated in the trial court, and the evidence was essentially the same for all three. One of them, Keilbar, appealed; the Ackermanns did not appeal. After Keilbar won a reversal on his appeal, the government having stipulated that it had not presented sufficient evidence, the Ackermanns sought to reopen the judgments against them. They argued that, as reflected in the decision on Keilbar's appeal, the judgments were erroneous, and they offered various grounds to justify their failure to appeal. However, this Court refused to grant the requested relief.

The Court held that—in light of the Ackermanns' "voluntary, deliberate, free, untrammeled choice . . . not to appeal" (340 U.S. at 200)—they were bound by the judgments against them, notwithstanding the fact that the result would have been different had they chosen to appeal. The Court stated that they "made a considered choice not to appeal" and "cannot be relieved of such a choice because hindsight seems to indicate to [them] that [their] decision not to appeal was probably wrong." 340 U.S. at 198. The Court concluded that "[t]here must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Id.*[13]

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[13] The issue in *Ackermann* was raised on a motion for relief from judgment under Fed. R. Civ. P. 60(b), but the principles are fully applicable to a case, such as this, involving an attempt to relitigate a previously dismissed claim. Indeed, if a conscious decision not to apeal bars the discretionary relief available under Rule 60(b) to relieve cases of individual hardship, *a fortiori* such a decision precludes an attempt to relitigate a dismissed claim.

The decisions in *Reed* and *Ackermann* were firmly rooted in the longstanding policies of finality and an end to litigation underlying the doctrine of *res judicata.* As the Court concluded in *Reed,* "indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments. . . ." 286 U.S. at 201. The same principles are fully applicable here.

Indeed, the case at bar presents even more compelling reasons for adherence to this basic doctrine than did *Reed* and *Ackermann.* There might have been a plausible justification for avoiding *res judicata* in *Reed* in order definitively to resolve the issue of title to the disputed property, and in *Ackermann* in order to relieve the petitioners from incarceration, but no such justification exists here. Moreover, respondents here seek to be the windfall beneficiaries of an appellate reversal procured by other parties with no interest in respondents' case, not a reversal in a related case procured, as in *Reed,* by the same affected party or, as in *Ackermann,* by a close relative.[14] Additionally, the failure to appeal in *Reed* may have been caused by a mistaken belief that *A* had adequately protected his rights by his first appeal, and the failure to appeal in *Ackermann* was apparently based on lack of funds and the advice of a government agent. Here the failure to appeal was a deliberate, calculated act, as part of respondents' attempt to circumvent the district court's judgment and refile their claims in camouflaged form in another court. If a relaxation of the doctrine of *res judicata* for sympathetic reasons was not deemed permissible in *Reed* or *Ackermann, a fortiori,* the overriding of so basic a doctrine is not permissible here.

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[14] Keilbar was Mrs. Ackermann's brother. 340 U.S. at 195.

The Court below attempted to distinguish these authorities in its substituted opinion on the ground that in the *Weinberg* appeals the court "could have reversed" the judgments in the unappealed *Moitie I* and *Brown I* cases. But this asserted distinguishing factor does not withstand scrutiny.

In the first place, the validity of the court's premise is questionable. As this Court observed in *Reed,* "[I]t is hardly necessary to say that jurisdiction to review one judgment gives an appellate court no power to reverse or modify another and independent judgment" even where, as in *Reed,* both judgments were based on the same facts and law. 286 U.S. at 198.[15] The state cases relied on by the court below also acknowledged the "general rule" that

> "[W]here only one of several parties appeals from a judgment, the appeal includes only that portion of the judgment adverse to the appealing party's interest, and the judgment is considered final as to the nonappealing parties." [16]

The exception expressed in those cases—that "such rule does not apply in cases where the rights of appealing and non-appealing parties are so interwoven or dependent on each other as to require a reversal of the

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[15] *See Larson* v. *Straff,* 340 F.2d 180, 191 n.28 (3d Cir. 1964) (reversal not applicable to nonappealing party); *Whitehead* v. *American Security & Trust Co.,* 285 F.2d 282, 286 (D.C. Cir. 1960) (same); *Annat* v *Beard,* 277 F.2d 554, 558 (5th Cir.), *cert. denied,* 364 U.S. 908 (1960) (same).

[16] *In re Estate of McDill,* 14 Cal. 3d 831, 840, 537 P.2d 874, 879 (1975). *See Ford Motor Credit Co.* v. *Uresti,* 581 S.W.2d 298, 300 (Tex. Civ. App. 1979); *Kvenild* v. *Taylor,* 594 P.2d 972, 978 (Wyo. 1979).

whole judgment when a part thereof is reversed" [17]— is inapplicable here. Respondents cannot claim that their cases are interwoven with the *Weinberg* cases, each of which was separately filed and purports to stand independently of the others, and from which respondents have repeatedly sought to differentiate themselves. This is particularly so with respect to *Brown,* which is the only case asserting claims with respect to Southern California.

Furthermore, even if the premise stated by the court below were valid, it does not distinguish the present cases from the controlling precedents. If, notwithstanding their failure to appeal, Moitie's and Brown's dismissals could have been reversed along with the *Weinberg* cases, the Ackermanns' convictions could have been reversed along with Keilbar's, since all three convictions occurred in a single consolidated action and were based on the same facts. The same is true of certain of the conflicting court of appeals' decisions discussed below. *See Annat* v. *Beard,* 277 F.2d 554 (5th Cir.), *cert. denied,* 364 U.S. 908 (1960) (decision with respect to respective land rights in consolidated condemnation action is *res judicata* as to nonappealing landowner, notwithstanding reversal on appeal procured by neighboring landowners). Indeed, the same

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[17] *Ford Motor Credit Co.* v. *Uresti, supra,* 581 S.W.2d at 300 (case remanded so that one defendant-appellee could pursue cross-claim against another defendant-appellee, from whom he purchased property subject to a lien without actual notice, based on reversal of judgment in favor of the former). *See In re Estate of McDill, supra* (allocation of estate among appealing and nonappealing heirs); *Kvenild* v. *Taylor, supra* (reversing damage award relating to sale of real property both as to appealing real estate agents and their nonappealing principal.)

could be said of any multi-party action in which fewer than all parties appeal from an adverse judgment.

This Court has made clear that the fact that another result "could have been" obtained if a different procedure was followed, does not defeat the application of *res judicata*. *Reed* v. *Allen, supra,* 286 U.S. at 198. Regardless of what "could have been" done, the fact is that the original *Moitie I* and *Brown I* dismissals were *not* reversed in the *Weinberg* cases. It has long been settled that once a judgment is entered, "[i]t not being set aside by subsequent proceedings, by appeal or otherwise," it stands as *res judicata* "whether the decision was right or wrong." *Wilson's Executor* v. *Deen,* 121 U.S. 525, 534 (1887).[18]

In this case, respondents took a calculated risk by not appealing from the dismissal of their first complaints in a deliberate attempt to segregate their cases from those filed by other plaintiffs. Their decision was part of a conscious strategm to circumvent the district court's adverse judgment by filing thinly camouflaged versions of their dismissed complaints in another forum. They may be disappointed now that their tactical approach failed while the approach of the appealing *Weinberg* plaintiffs succeeded, but they must bear the consequences of their actions. Here, as in *Reed,* "the predicament in which respondent finds himself is of his own making," the consequence of a conscious

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[18] *See Angel* v. *Bullington,* 330 U.S. 183, 189-90 (1947) ("If a litigant chooses not to continue to assert his rights after . . . [a lower court] has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him. . . . He cannot begin all over again in an action involving the same issues in another forum in the same State.").

decision not to appeal. 286 U.S. at 198. The result should be the same here as in *Reed* (286 U.S. at 198-99):

> "Having so failed, we can not be expected, for his sole relief, to upset the general and well established doctrine of *res judicata,* conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy." *See also Sunal* v. *Large,* 332 U.S. 174, 181-82 (1947).

The novel proposition adopted by the court below—that *res judicata* should not apply because the dismissal rested on a case that was "effectively" overruled by a legal principle concerned in a separate case (App. A, *infra,* at 5a; App. B, *infra,* at 11a.) is contrary to the controlling decisions of this Court, discussed above. Indeed, this Court has squarely rejected this rationale in prior cases. *See Reed, Ackermann, Chicot County* and *Oppenheimer, supra.* There is no basis for deviating from these authorities and weakening the salutary principle of *res judicata* in this or any other multiparty litigation.

II. The Court of Appeals' Decision Is in Conflict With the Decisions of the Courts of Appeals in Other Circuits

The decision below stands alone in an otherwise unbroken line of cases in the federal courts of appeals holding that an adverse judgment from which no appeal has been taken is *res judicata* and bars any future action on the same claim, even if an authoritative contrary judicial decision on the legal issues involved is subsequently rendered in another case. *See Stewart Securities Corp.* v. *Guaranty Trust Corp.,* 597 F.2d

240, 241-42 (10th Cir. 1979); *de Filippis* v. *United States,* 567 F.2d 341 (7th Cir. 1977); *Lubben* v. *Selective Serv. Sys. Local Bd. No. 27,* 453 F.2d 645, 650-51 (1st Cir. 1972); *Barzin* v. *Selective Serv. Sys. Local Bd. No. 14,* 446 F.2d 1382, 1383 (3d Cir. 1971); *Annat* v. *Beard,* 277 F.2d 552 (5th Cir.), *cert. denied,* 364 U.S. 908 (1960); *Collins* v. *City of Wichita,* 254 F.2d 837 (10th Cir. 1958); *Clouatre* v. *Houston Fire & Cas. Co.,* 229 F.2d 596, 597-98 (5th Cir. 1956); *Berryhill* v. *United States,* 199 F.2d 217 (6th Cir. 1952); *Appleton Toy & Furn. Co.* v. *Lehman Co.,* 165 F.2d 801, 802 (7th Cir. 1948); *Ripperger* v. *A.C. Allyn & Co.,* 113 F.2d 332, 334 (2d Cir.), *cert. denied,* 311 U.S. 695 (1940).

In each of the foregoing cases, as in the case at bar, a party suffered an adverse judgment and did not appeal. Subsequently, the legal principle on which the judgment rested was overruled by this Court or the court of appeals. In each case, the party in question sought to rely on the subsequent overruling decision as a basis for evading the binding *res judicata* effect of the prior judgment. And in each such case—except for the decision below—the court of appeals flatly rejected the contention.

The rationale of the foregoing line of cases is the same as that underlying the decisions of this Court discussed above. The effective administration of justice depends on the assurance that, once a judgment is entered and "[n]o appeal having been taken, the former decision stands as a conclusive determination of . . . [the decided] issue between the parties." *Ripperger* v. *A.C. Allyn & Co., supra,* 113 F.2d at 334. The fact that, in individual cases, decisions may be left standing that are inconsistent with subsequent authoritative rulings cannot be used to erode the basic doctrine. As for the

party in such cases who made a "free and deliberate choice" to forgo the right to appeal, it "must now live with its decision." *Berryhill* v. *United States, supra,* 199 F.2d at 219; *Lubben* v. *Selective Serv. Sys. Local Bd. No. 27, supra,* 454 F.2d at 652. The deleterious effects of a contrary ruling—such as the decision below—on the finality of judgments and the effective operation of the judicial system far outweigh the possible benefits of relieving particular individuals of the consequences of their decision not to appeal.

The conflict between the decision below and those of the courts of appeals in other circuits cannot be reconciled on the ground that, in this case, the overruling decision was obtained by parties appealing from the same district court proceeding from which respondents elected not to appeal. As one court of appeals recently noted, "[T]here are many different situations in which different results are reached on a single claim involving multiple parties . . . [which] are not necessarily logically inconsistent or absurd." *In re Uranium Antitrust Litigation,* BNA Antitrust and Trade Regulation Report No. 953 at F-1, F-S n. 41 (7th Cir. 1980). The court gave as one illustrative example the situation "when one defendant accepts an adverse judgment while the other successfully appeals." *(Id.)*

There is no sound reason why the *res judicata* effect of respondents' unappealed judgment should turn on whether or not other unrelated parties had filed similar actions and whether or not those parties, by appealing, were able to benefit from this Court's decision in the *Reiter* case. In any event, the decision below clearly conflicts with those in other multi-party cases in which the courts of appeals expressly refused to grant

nonappealing parties the benefits of reversals obtained by appealing parties.

Particularly in point is *Annat* v. *Beard, supra,* in which the Fifth Circuit applied the doctrine of *res judicata* in circumstances closely analogous to those presented here. Annat was a landowner-defendant in one of several condemnation proceedings brought by the United States to acquire land for a national park. In these proceedings, which were consolidated and tried together before the same district court, two different survey maps were offered to describe the various tracts in question. The district court adopted survey *A,* which designated a twenty percent smaller area for Annat's land than survey *B.* Several landowner-defendants appealed from the final judgment of condemnation, but Annat did not appeal. On appeal, the Fifth Circuit held that survey *B* should have been adopted as the basis for determining the metes and bounds of the land taken and the amount of compensation. Thereafter, Annat brought an action for ejectment against the park superintendent, claiming that she was in unlawful possession of that portion of the land shown as belonging to Annat on survey *B,* but not on survey *A.* The district court granted summary judgment against Annat and also denied a motion for relief from the original condemnation judgment. The court of appeals affirmed.

The court assumed that, if Annat had appealed from the original judgment, "she would have obtained the same successful result as did the appealing defendants. . . . [b]ut Mrs. Annat did not appeal." (277 F.2d at 558.) The court held that "[a] reversal on appeal does not inure to the benefit of those who did not join in the appeal unless the interests of the non-appealing par-

ties are so interwoven and dependent as to be inseparable." (*Id.*) Noting that the only joint interest of Mrs. Annat and the other defendants was "in the proposition of law which [they] resolved for [their] benefit and Mrs. Annat did not," the court concluded that "the principle of *res judicata* requires us to hold that the situation of Mrs. Annat is not bettered by the . . . reversal" obtained by those defendants who did appeal. (277 F.2d at 559.) *See also Larson* v. *Straff*, 340 F.2d 180, 191 n.28 (3d Cir. 1964); *Whitehead* v. *American Security & Trust Co.*, 285 F.2d 282, 286 (D.C. Cir. 1960). *Cf. In re Uranium Antitrust Litigation*, BNA Antitrust and Trade Regulation Report No. 953 at F-1, F-5 n. 41 (7th Cir. 1980).

The conflict of decisions created by the court of appeals' ruling in this case should be promptly eliminated. The application of *res judicata* in multi-party proceedings in federal courts should be uniform throughout all the circuits. The stability and efficient administration of justice promoted by *res judicata* depend upon the rules of that doctrine being clear and consistently applied. The decision below creates an exception for multi-party cases which is not only inconsistent with the decisions in this Court and other circuits but which, if allowed to stand, will add further complexities and incentives for abuse of the judicial process to this category of cases.

In *Reiter* v. *Sonotone Corp., supra,* this Court recognized that concerns expressed about the economic and administrative burdens of cases such as those involved here "are not without substance" and observed that such actions "need not result in administrative chaos, class action harassment, or 'windfall' settlements if the district courts exercise sound discretion

and use the tools available." 442 U.S. at 345. It is ironic that, in one of the first decisions purporting to rely on *Reiter,* the court of appeals reversed the district court for using one of the most firmly established "tools" for ensuring sound judicial administration, minimizing burdensome duplication and redressing abusive tactical maneuvering—the doctrine of *res judicata.* That doctrine should apply with full force in multi-party actions just as it applies in individual actions, and the exception carved out by the court below should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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March 1980

APPENDIX

APPENDIX A

Original Decision of the Court of Appeals
Filed November 1, 1979

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-3101

MARILYN MOITIE, Individually, and on behalf of others similarly situated, *Appellants,*

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & Co., and BULLOCK'S NORTHERN CAFIFORNIA; SAKS & COMPANY d/b/a SAKS FIFTH AVENUE; and DOES I through XX, *Appellees.*

FLOYD R. BROWN, Individually, and on behalf of others similarly situated, *Appellants,*

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & Co. and BULLOCK'S; SAKS & COMPANY d/b/a SAKS FIFTH AVENUE; and DOES I through XX, *Appellees.*

Appeal from the United States District Court for the Northern District of California

MEMORANDUM

Before: WRIGHT and TANG, Circuit Judges, and JAMESON, Senior District Judge.*

This appeal presents a complex and novel issue related to the doctrine of *res judicata*: when several cases are consolidated for trial with some but not all of the plaintiffs appealing successfully, is the first decision *res judicata*

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* Of the District of Montana.

as to those plaintiffs who did not appeal? Under the facts of this case, we hold that the interests of justice require that the entire decision be rendered inoperative, and we therefore reverse and remand.

FACTS

In April 1976 the government brought antitrust actions against defendant department stores alleging price fixing on women's clothing in northern California. Shortly thereafter several private parties filed antitrust actions against the same defendants, incorporating the government's allegations in their complaints.

Appellant Moitie filed a complaint in state court in May 1976 (Moitie I). Defendants removed the action to federal court, where it was consolidated with several related actions, including that of appellant Brown.

In January 1977 the district court decided the consolidated case for the defendants. The decision is reported at 426 F. Supp. 880. The district judge held that the plaintiffs, as private parties, lacked standing to sue under § 4 of the Clayton Act, 15 U.S.C. § 15. He dismissed the complaints for failure to allege specific standing to sue.

Only five of the seven losing plaintiffs appealed. Appellants Moitie and Brown did not.

While the five appeals were pending before this court, the Supreme Court decided *Reiter* v. *Sonotone Corp.*, —— U.S. ——, 99 S. Ct. 2326 (1979). The Court held that a private party *may* have standing to sue for antitrust violations under § 4 of the Clayton Act. Pursuant to *Reiter*, we reversed and remanded the five cases pending before us, for a determination in the trial court consistent with *Reiter*.[1]

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[1] The original consolidated case is reported under the name *Weinberg* v. *Federated Department Stores*. This court reversed the trial court by an order filed June 25, 1979, which read:

As noted, appellants Moitie and Brown did not appeal the 1977 decision. Rather, they filed new actions in state court, alleging state causes of action for defendant's price-fixing. Defendants moved for removal to federal court, asserting that the state law claims were really disguised federal antitrust claims. The district court agreed with defendants and removed the actions. It then dismissed them on the basis of *res judicata*, these parties and their claims having already been decided in *Moitie I*. Judgment of dismissal was entered on July 7, 1977.

ISSUES PRESENTED [2]

Appellants first contend that removal was improper because they stated a valid state claim. We disagree. The court below correctly held that the claims presented were federal in nature, arising solely from price fixing on defendants' part. In light of our disposition of this appeal, appellants will not quarrel with the result.

The controlling issue is the continuing validity of *Moitie I* for *res judicata* purposes. Now that the decision in *Moitie I* has been effectively reversed by this court, should the decision in *Moitie II* which cited *Moitie I* as *res judicata* also be reversed?

Following oral argument on December 7, 1978, this court ordered that submission of this appeal should be withheld pending action by the United States Supreme Court in *Reiter* v. *Sonotone Corp.*, 579 F.2d 1077 (8th Cir. 1978). On June 11, 1979 the Supreme Court decided *Reiter* v. *Sonotone Corp.*, —— U.S. ——, 47 U.S.L.W. 4672.

IT IS ORDERED that the judgments of the district court are reversed, and the cause is remanded for further proceedings in light of *Reiter* v. *Sonotone Corp.*

[2] The parties have devoted their briefs and oral arguments to the removal issue. They have not briefed the *res judicata* question, even after invitation to do so.

RES JUDICATA

We begin with the rule of law that, when a decision has been reversed on appeal, it cannot control subsequent cases as *res judicata*. The Supreme Court implied this in *Butler* v. *Eaton*, 141 U.S. 240 (1891). The present doctrine is summarized by Professor Moore:

> When a judgment has been subjected to appellate review, the appellate court's disposition of the judgment generally provides the key to its continued force as res judicata and collateral estoppel. A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel.

1B *Moore's Federal Practice* (2d ed.) ¶ 0.416[2], p. 2231.[3]

Under this doctrine, if appellants had appealed from the judgment in *Moitie I*, we would now reverse it in *Moitie II*. Because they did not appeal *Moitie I*, however, that judgment has technically never been reversed as to them. A strict application of the doctrine of *res judicata* would preclude our review of the instant decision.

Such a technical application of the doctrine ignores the obvious fact that the decision in *Moitie I*, if not the judgment as to these two appellants, has been reversed. Such technical application of procedural rules defeats our real purpose, which is to do justice. As with the other five plaintiffs whose cases were consolidated in *Moitie I*, appellants Brown and Moitie should have their day in court. Had the district court known of the Supreme Court's dis-

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[3] The same conclusion was reached in ***McDonald*** **v.** ***McDonald,*** 53 Wis.2d 371, 192 N.W.2d 903 (1972):

> **The reversal of a judgment which is a basis of a claim of res judicata in a later action warrants reversal of the finding of res judicata in the later action.**

192 N.W.2d at p. 912.

position in *Reiter*, and of our subsequent reversal of *Moitie I*, it would not have dismissed the instant actions on *res judicata* grounds.

An appellate court must do what is necessary to render substantial justice. *Ashcraft* v. *Tennessee*, 322 U.S. 143 (1944). "In disposing of cases before us it is our responsibiltiy to make such disposition as justice may require." *Id.*, at p. 156. Because the instant dismissal rested on a case that has been effectively overruled, justice requires that the dismissal be reversed.[4] We remand to the district court for proceedings consistent with the holding in *Reiter, supra.*

REVERSED AND REMANDED.

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[4] We are also mindful of the fact that *Moitie I* was dismissed for want of standing to sue. No court has ever considered these actions on the merits.

APPENDIX B

Order and Substituted Decision of the Court of Appeals Filed January 15, 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-3101

MARILYN MOITIE and FLOYD R. BROWN, Individually and on behalf of others similarly situated, *Appellants*,

v.

FEDERATED DEPARMTENT STORES, INC., dba I. MAGNIN & Co., and BULLOCKS NORTHERN CALIFORNIA; SAKS & COMPANY dba SAKS FIFTH AVENUE; and DOES I through XX, *Appellees*.

Before: WRIGHT and TANG, Circuit Judges, and JAMESON, Senior District Judge.

The Memorandum disposition filed November 15, 1979 is ordered withdrawn.

The attached authored Opinion is substituted for it.

* * * *

WRIGHT, Circuit Judge:

This appeal presents a complex and novel issue related to the doctrine of *res judicata*: when several cases are consolidated for trial with some but not all of the plaintiffs appealing successfully, is the first decision *res judicata* as to those plaintiffs who did not appeal? Under the facts of this case, we hold that the interests of justice require that the entire decision be rendered inoperative, and we therefore reverse and remand.

FACTS

In April 1976 the government brought antitrust actions against defendant department stores alleging price fixing on women's clothing in northern California. Shortly thereafter several private parties filed antitrust actions against the same defendants, incorporating the government's allegations in their complaints.

Appellant Moitie filed a complaint in state court in May 1976 (Moitie I). Defendants removed the action to federal court, where it was consolidated with several related actions, including that of appellant Brown.

In January 1977 the district court decided the consolidated case for the defendants. The decision is reported at 426 F. Supp. 880. The district judge held that the plaintiffs, as private parties, lacked standing to sue under § 4 of the Clayton Act, 15 U.S.C. § 15. He dismissed the complaints for failure to allege specific standing to sue.

Only five of the seven losing plaintiffs appealed. Appellants Moitie and Brown did not.

While the five appeals were pending before this court, the Supreme Court decided *Reiter* v. *Sonotone Corp.*, —— U.S. ——, 99 S. Ct. 2326 (1979). The Court held that a private party *may* have standing to sue for antitrust violations under § 4 of the Clayton Act. Pursuant to *Reiter*, we reversed and remanded the five cases pending before us, for a determination in the trial court consistent with *Reiter*.[1]

---

[1] The original consolidated case is reported under the name *Weinberg* v. *Federated Department Stores*, 426 F.Supp. 880 (N.D. Cal. 1977). This court reversed the trial court by an order filed June 25, 1979, which read:

> Following oral argument on December 7, 1978, this court ordered that submission of this appeal should be withheld pending action by the United States Supreme Court in *Reiter* v. *Sonotone Corp.*, 579 F.2d 1077 (8th Cir. 1978). On June 11,

As noted, appellants Moitie and Brown did not appeal the 1977 decision. Rather, they filed new actions in state court, alleging state causes of action for defendant's price-fixing. Defendants moved for removal to federal court, asserting that the state law claims were really disguised federal antitrust claims. The district court agreed with defendants and removed the actions. It then dismissed them on the basis of *res judicata*, these parties and their claims having already been decided in *Moitie I*. Judgment of dismissal was entered on July 7, 1977.

ISSUES PRESENTED [2]

Appellants first contend that removal was improper because they stated a valid state claim. We disagree. The court below correctly held that the claims presented were federal in nature, arising solely from price fixing on defendants' part. In light of our disposition of this appeal, appellants will not quarrel with the result.

The controlling issue is the continuing validity of *Moitie I* for *res judicata* purposes. Now that the decision in *Moitie I* has been effectively reversed by this court, should the decision in *Moitie II* which cited *Moitie I* as *res judicata* also be reversed?

1979 the Supreme Court decided *Reiter* v. *Sonotone Corp.*, —— U.S. ——, 47 U.S.L.W. 4672.

IT IS ORDERED that the judgments of the district court are reversed, and the cause is remanded for further proceedings in light of *Reiter* v. *Sonotone Corp.*

[2] The parties have devoted their briefs and oral arguments to the removal issue. They have not briefed the *res judicata* question, even after invitation to do so.

RES JUDICATA

We begin with the rule of law that, when a decision has been reversed on appeal, it cannot control subsequent cases as *res judicata*. The Supreme Court implied this in *Butler* v. *Eaton*, 141 U.S. 240 (1891). The present doctrine is summarized by Professor Moore:

> When a judgment has been subjected to appellate review, the appellate court's disposition of the judgment generally provides the key to its continued force as res judicata and collateral estoppel. A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel.

1B *Moore's Federal Practice* (2d ed.) ¶ O.416[2], p. 2231.[3]

Under this doctrine, if appellants had appealed from the judgment in *Moitie I*, we would now reverse it in *Moitie II*. Because they did not appeal *Moitie I*, however, that judgment has technically never been reversed as to them. A strict application of the doctrine of *res judicata* would preclude our review of the instant decision.

Such a technical application of the doctrine ignores the obvious fact that the decision in *Moitie I*, if not the judgment as to these two appellants, has been reversed. Such technical application of procedural rules defeats our real purpose, which is to do justice. As with the other five plaintiffs whose cases were consolidated in *Moitie I*, appellants Brown and Moitie should have their day in court. Had the district court known of the Supreme Court's disposition in *Reiter*, and of our subsequent reversal of

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[3] The same conclusion was reached in *McDonald* v. *McDonald*, 53 Wis.2d 371, 192 N.W.2d 903 (1972):

> The reversal of a judgment which is a basis of a claim of res judicata in a later action warrants reversal of the finding of res judicata in the later action.

192 N.W.2d at p. 912.

Moitie I, it would not have dismissed the instant actions on *res judicata* grounds.

It is well-established that non-appealing parties may benefit from a reversal when their position is closely interwoven with that of appealing parties. *See, e.g., Kvenild* v. *Taylor,* 594 P.2d 972, 978 (Wyo. 1979); *Ford Motor Credit Co.* v. *Uresti,* 581 S.W.2d 298, 300 (Tex. 1979); *In Re Estate of McDill,* 14 Cal.3d 831, 840, 122 Cal. Rptr. 754, 759, 537 P.2d 874 (1975).

In this case the appealing and non-appealing parties' positions are identical. There are no factual differences because the lower court did not reach the merits, holding as a matter of law that consumers had no standing to bring these antitrust actions.

The fact that this court could have reversed the judgments against Moitie and Brown when it reversed *Weinberg,* distinguishes the case from those cited by appellees. In *Reed* v. *Allen,* 286 U.S. 191 (1932), there were two separate but related cases. The first concerned the right to rents from certain property. The second was an ejectment action brought by the successful party in case 1. Case 1 was appealed and reversed and case 2 was not appealed. When the successful appellant in case 1 brought a new ejectment action, the court held that the suit was barred by *res judicata* because case 2 had not been appealed.

Here by contrast, the underlying case was successfully appealed. As noted, this court could reverse even as to non-appealing parties. In *Reed* the court which reversed case 1 had no jurisdiction to reverse case 2. The other cases cited by appellees are similarly distinguishable.

The doctrine of *res judicata* must, in rare instances, give way to overriding concerns of public policy and simple justice. *See, e.g., La Societe Anonyme des Parfums Le-*

Galion v. *Jean Patou, Inc.*, 495 F.2d 1265, 1276 (2d Cir. 1974); 1B *Moore's Federal Practice* (2d ed. ¶ 0.405[11], p. 783. To apply the doctrine here would ignore common sense and simple justice. The trial court's initial determination that these plaintiffs had no standing to sue has been overruled by the Supreme Court and by this court. Only a hypertechnical application of a judicially-created doctrine would deny them their day in court.

An appellate court must do what is necessary to render substantial justice. *Ashcraft* v. *Tennessee*, 322 U.S. 143 (1944). "In disposing of cases before us it is our reponsibility to make such disposition as justice may require." *Id.*, at p. 156. Becaue the instant dismissal rested on a case that has been effectively overruled, justice requires that the dismissal be reversed.[4] We remand to the district court for proceedings consistent with the holding in *Reiter*, *supra*.

REVERSED AND REMANDED.

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[4] We are also mindful of the fact that *Moitie I* was dismissed for want of standing to sue. No court has ever considered these actions on the merits.

APPENDIX C

Decision of the District Court
Filed July 8, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-77-0576 SW

MARILYN MOITIE, et al., *Plaintiffs,*

v.

FEDERATED DEPARTMENT STORES, et al., *Defendants.*

No. C-77-0577 SW

FLOYD R. BROWN, et al., *Plaintiffs,*

v.

FEDERATED DEPARTMENT STORES, et al., *Defendants.*

ORDER DENYING PLAINTIFFS' MOTION TO REMAND AND GRANTING DEFENDANTS' MOTION TO DISMISS

Defendants have removed plaintiffs' actions to this Court and have moved for an order dismissing plaintiffs' complaints, which has been followed by plaintiffs' motion to remand. The disposition of these motions requires an extensive review and analysis of the origins and substance of these complaints.

FACTS

On April 28, 1976, the United States filed a civil complaint and a criminal indictment against defendants in this present action, both of which alleged that defendants engaged in a price fixing conspiracy from 1963 to April,

1974, in violation of Section 1 of the Sherman Act.[1] Plaintiff Moitie filed a class action complaint in Superior Court for Santa Clara County against the defendants in the present action on May 6, 1976. This first *Moitie* complaint also charged defendants with engaging in a price fixing conspiracy during the same period of time alleged by the government. The allegations of plaintiff Moitie relied heavily on those contained in the government's complaint. Specifically, plaintiff's allegations entitled "Trade and Commerce," "Offenses Charged," and "Effects," were almost verbatim repetitions of those prepared by the government. The significant difference is that plaintiff Moitie did not make reference to the Sherman Act, but instead charged defendants with violating Section 16720 of the California Business and Professions Code (the Cartwright Act). Plaintiff sought treble damages calculated on a base figure in excess of $5,000, fees and costs, and injunctive relief. Defendants subsequently removed plaintiff's action to this Court, claiming both diversity of citizenship and federal question jurisdiction, on June 1, 1976. Plaintiff did not move to remand her action to state court.

On June 15, 1976 plaintiff Brown filed a class action complaint in this Court against the defendants in the present action. Plaintiff Brown, also relying on the "Trade and Commerce," and "Offenses Charged," allegations contained in the government's complaint and indictment, charged defendants with engaging in a price fixing conspiracy during the same period alleged by the government, in violation of Section 1 of the Sherman Act, the same charge alleged by the government. Plaintiff Brown sought unspecified treble damages, fees and costs pursuant to Section 4 of the Clayton Act, and injunctive relief pursuant to Section 16 of the Act.

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[1] *United States* v. *Federated Dept. Stores, Inc., et al.*, C-76-858 RHS; *United States* v. *Federated Dept. Stores, Inc., et al.*, CR-76-236 SAW. The criminal action has been concluded; the civil action is still pending in this Court.

The *Moitie* and *Brown* cases were consolidated, along with five other related class actions, and defendants moved to dismiss all seven complaints for failure to state a claim on which relief could be granted. On January 11 and 12, 1977 this Court entered orders granting defendants' motion and dismissing all seven actions for failure to allege sufficient standing to sue. Specifically, the Court dismissed the Section 4 Clayton Act claims because the plaintiffs failed to show an injury to a competitive interest in a business in which they were engaged. The Section 16 claim was dismissed because the plaintiffs were not, under the circumstances of their suits, faced with irreparable injury which would entitle them to injunctive relief.

The five other cases appealed and are now pending in the Ninth Circuit. Plaintiffs Moitie and Brown chose not to appeal, and filed new class action complaints in state municipal court on February 13 and 17, 1977, respectively. These new complaints are also in many respects identical to those previously filed by the plaintiffs and to the complaint and indictment filed by the government. The new complaints are against the same defendants, allege the same unlawful act (engaging in a price fixing conspiracy) during the same time period (1963 to April, 1974), are bought on behalf of essentially the same classes of plaintiffs as the previous complaints,[2] and incorporate the same "Trade and Commerce," "Offenses Charged," and "Effects," allegations contained in the government complaint and indictment.

Unlike their previous complaints, the present Moitie complaint makes no mention of the Cartwright Act and the Brown complaint makes no reference to the Sherman and Clayton Acts. Instead, both complaints allege four identical causes of action—fraud and deceit, unfair business prac-

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[2] The new Brown complaint adds four additional classes of plaintiffs residing in four California counties.

tices, civil conspiracy, and restitution of moneys had and received—which were not included in their previous complaints. The second Moitie and Brown complaints also differ from their first complaints in that injunctive relief is not sought and the amount of damages claimed is now not less than $600 per person.

MOTION TO REMAND

Defendants have removed the second Moitie and Brown complaints to this Court on the basis of diversity of citizenship and federal question jurisdiction. In their motion to remand, plaintiffs concede diversity, but deny that the amount in controversy exceeds $10,000 and argue that their complaints do not assert claims arising under the Constitution or laws of the United States. As defendants correctly state in their opposition to plaintiffs motion to remand, these complaints may be properly removed to this Court, regardless of the amount in controversy, if they could have been originally brought in a federal court without meeting any minimum amount in controversy (*Allen* v. *New York*, 15 F.2d 532, 533 (4th Cir. 1926). Wright, Federal Practice and Procedure, § 3725, p. 660). Defendants argue that since the present complaints arise under federal antitrust legislation, Title 28 U.S.C. § 1337,[3] which has no jurisdictional amount requirement, applies and plaintiffs' complaints may be removed without meeting the $10,000 amount in controversy requirement.

The issue concerning removal is then whether the plaintiffs are asserting claims which are founded on rights resting on federal antitrust laws, and which could have originally been brought in federal court without meeting any minimum amount in controversy.

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[3] "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U.S.C. § 1337.

It is an established principle that in the absence of a fraudulent purpose to defeat removal, the plaintiff by the allegations of his complaint determines its status with respect to removability (*Great Northern Ry. Co.* v. *Alexander,* 246 U.S. 276 [1918]). Removability does not depend on any allegations which defendant might make in a responsive pleading or in his removal petition (*Chrysler Credit Corp.* v. *Ralph Williams Gulfgate Chrysler-Plymouth,* 329 F.Supp. 644, 647 [S.D. Tex. 1971]). Accordingly, a plaintiff may defeat removal to the federal courts by avoiding allegations which provide a basis for the assertion of federal jurisdiction (*Jones* v. *General Tire & Rubber Co.,* 541 F.2d 660 [7th Cir. 1976]), but a plaintiff may not defeat removal by employing artful pleading to cast his claim, the essence of which is a federal right, in terms of state law (*State of New York* v. *L. 1115 J. Bd., N.H. & HED,* 412 F.Supp. 720, 722 [E.D. N.Y. 1976]).

As noted in the analysis section above, allegations contained in the civil complaint and criminal indictment originally filed by the United States against defendants have remained consistent elements of the first and second complaints filed by plaintiffs Moitie and Brown. In relying on these allegations, plaintiff Moitie cast the character, and hence determined the removability status, of her first complaint. Although the first Moitie complaint asserted a violation of California state law, defendants removal to this Court was not met by plaintiff's motion to remand, though this option was considered by plaintiff's counsel.[4] The first Brown complaint was subsequently filed with this Court, alleging exactly the offense (violation of Section 1 of the

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[4] During the proceedings on defendants' motion to extend time to answer plaintiff's complaint, the following colloquy took place:

"Judge Renfrew: . . . You say you think you have a basis for a motion to remand?

"Mr. Offstein Counsel for Moitie): I would like to find out if there are facts upon which to found a basis." (Transcript, June 3, 1976, p. 11).

Sherman Act) as was alleged in the complaint and indictment filed by the United States.

Just as plaintiff Moitie cast the character and determined the removability status of her first complaint by relying on allegations contained in the complaint and indictment filed by the United States, plaintiffs Moitie and Brown have now done the same with respect to their second complaints by their continued reliance on these government allegations. Artful pleading by plaintiffs which adds four new state causes of action and deletes specific reference to violations of federal antitrsut laws cannot convert their essentially federal law claims into state law claims. From start to finish, plaintiffs have essentially alleged violations by defendants of federal antitrust laws. Plaintiffs complaints were properly removed to this Court because they concerned federal questions which could have been originally brought in Federal District Court without satisfying any minimum amount in controversy. Therefore, plaintiffs motion to remand to state court is denied.

MOTION TO DISMISS

The above analysis of plaintiffs' first and second complaints demonstrates that they involve the same parties, the same alleged offenses, and the same time periods. This Court dismissed plaintiffs' first complaints for failure to allege sufficient standing to sue. Given the similar identity of the first and second complaints, the doctrine of *res judicata* requires the applicaion of the dismissal of the first complaints to their successors which are now before the Court. Defendants' motion to dismiss plaintiffs' complaints is granted.

IT IS SO ORDERED.

/s/ SPENCER WILLIAMS
United States District Judge

Dated: June 30, 1977

APPENDIX D

Comparison of Complaint Allegations

Allegations of the *Brown II* Complaint (CR 391)* and *Moitie II* Complaint (CR 167) which, except as noted below, are verbatim copies of allegations contained in the *Brown I* (CR 126) and *Moitie I* Complaints (CR 9):

(i) *Class action allegations: Moitie I,* ¶ I (1 & 2), *Moitie I,* ¶ I; *Brown II,* ¶ I (1 & 2), *Brown I,* ¶ I (3). The class action allegations in *Brown II* are identical to those in *Brown I* except for (i) a slight modification in the first sentence and (ii) the inclusion of four additional Los Angeles area counties in the *Brown II* Complaint.

(ii) *Description of the plaintiffs: Moitie I* and *II,* ¶ II; *Brown I* and *II,* ¶ II.

(iii) *Description of the defendants: Moitie I* and *II,* ¶ III; *Brown I* and *II,* ¶ III. The only difference between these allegations in the *Brown I* and *II* Complaints is that the former alleged that Federated did business under the name of "Bullock's Southern California" with its principal offices in Los Angeles, while the latter substitutes the name "Bullock's" and alleges that its principal offices are in Palo Alto.

(iv) *Description of "Does": Moitie I* and *II,* ¶ IV. No "Does" were alleged in the *Brown I* Complaint, but the "Doe" allegation in *Brown II* is a verbatim copy of the "Does" paragraph in *Moitie I.*

(v) *Description of agents and co-conspirators: Moitie I* and *II,* ¶ V; *Brown II,* ¶ V, *Brown I,* ¶ IV.

(vi) *Description of the trade and commerce allegedly affected: Moitie I* and *II,* ¶ VI; *Brown II,* ¶ VI, *Brown I,* ¶ V.

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* References are to the record in the court below.

(vii) *Statement of the "offenses charged," i.e., the basic allegations of the alleged wrong committed by defendants against the plaintiffs: Moitie I* and *II*, ¶ VII; *Brown II*, ¶ VII, *Brown I*, ¶ VI.

(viii) *Statement of the alleged "effects" of the defendants' alleged "offenses": Moitie I* and *II* and *Brown II*, ¶ VIII.*

(ix) *Statement of the alleged injury to the plaintiffs: Moitie I* and *II*, ¶ IX; *Brown II*, ¶ IX, *Brown I*, ¶ VII.

(x) *Allegations of fraudulent concealment: Moitie I* and *II*, ¶ X; *Brown II*, ¶ X, *Brown I*, ¶ VIII.

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* No "effects" were alleged in *Brown I*, but this allegation in *Brown II* is essentially a verbatim copy of the "effects" paragraph in *Moitie I* which was in turn a verbatim copy of the "effects" paragraph in the government's complaint. *United States* v. *Federated Dept. Stores, Inc., et al.*, C-76-858 RHS, Complaint ¶ VI. While there were three "effects" alleged in the government complaint and *Moitie I* (subparagraphs a, b & c), only the first two of these are copied in *Moitie II* and *Brown II*.